Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-488-1992 AND 02-489-1992
ANUAR CJ (MALAYA), WAN ADNAN FCJ AND ZAKARIA YATIM JCA
8 NOVEMBER 1995

Civil Procedure *— Appeal — Record and memorandum of appeal — Application for extension of time to file — Failure to comply with practice direction — Whether fatal — Discretion of court — Grounds for exercise of discretion — Rules of the Supreme Court 1980 r 62(7)*

Before hearing the appeals, the Supreme Court had to first decide whether to grant the appellant in the second appeal's application for an extension of time to file the record of appeal after the expiry of the six weeks pursuant to r 62(7) of the Rules of the Supreme Court 1980 ('the RSC'). The respondents, however, applied for an order that appellant's notice of appeal be struck out with costs as the appellant had failed to comply with Practice Directions No 2 of 1991 and No 5 of 1990. Judgment had been entered against the appellant on 12 October 1992 and the appellant filed its notice of appeal on 24 October 1992. The time limited for requesting the notes of evidence was one week from the date of the filing of the notice of appeal. However, the appellant did not make the request until 18 November 1992 due to the appellant's solicitors' inadvertence and mistaken impression that the request was to be made within one week of the expiry of one month from the filing of the notice of appeal. On 23 November 1992, the judge's secretary wrote to the appellant's solicitors that he was still typing the notes of evidence. On 28 November 1992, the appellant's solicitors formally applied to the senior assistant registrar for an extension of time to file the record of appeal on the ground that they were awaiting the notes of evidence. On 18 December 1992, the deputy registrar of the Supreme Court informed the appellant's solicitors that their application for extension of time had been refused on the grounds that their request for the notes of evidence had been delayed. The appellant applied to the Supreme Court for an extension of time on 21 December 1992.

Held, dismissing the appellant's application:

(1) The deputy registrar was merely carrying out an administrative duty pursuant to Practice Direction No 5 of 1990 when she refused the extension of time. Practice directions are intended to be no more than directions for administrative purposes and the authority to grant an extension of time lies with the Supreme Court under r 62(7) of the RSC, which provides that the memorandum and record of appeal shall be filed within six weeks after the entry of the appeal or such further time as the Supreme Court or a judge of that court may allow.

(2) In this case, the appellant applied for extension of time only on 21 December 1992, ie more than eight weeks after filing the notice of appeal, although it had already been informed on 23 November 1992 by the trial judge's secretary that he was still typing the notes of evidence. Although under r 62(7), the court has the discretion to grant an extension of time to file the record of appeal, there was no material upon which the court could exercise its discretion. Indeed, the delay was admittedly due to the inadvertence and mistake of the appellant's solicitors.

[Bahasa Malaysia summary

Sebelum membicarakan rayuan-rayuan ini, Mahkamah Agung perlu terlebih dahulu membuat keputusan sama ada membenarkan permohonan perayu di dalam rayuan kedua untuk mendapatkan perlanjutan masa untuk memfailkan rekod rayuan selepas luputnya tempoh enam minggu mengikut k 62(7) Kaedah-Kaedah Mahkamah Agung 1980 ('KMA'). Penentang, bagaimanapun, memohon untuk perintah supaya notis rayuan perayu dibatalkan dengan kos kerana perayu telah gagal mematuhi Arahan Amalan No 2 Tahun 1991 dan No 5 Tahun 1990. Penghakiman telahpun dicatatkan terhadap perayu pada 12 Oktober 1992 dan perayu telah memfailkan notis rayuannya pada 24 Oktober 1992. Masa yang dihadkan untuk membuat permohonan bagi nota keterangan adalah satu minggu dari tarikh notis rayuan difailkan. Akan tetapi, perayu tidak membuat permohonannya sehingga 18 November 1992 disebabkan kelalaian peguamcara perayu dan tanggapan salah mereka bahawa permohonan itu perlu dibuat dalam masa satu bulan dari tarikh notis rayuan difailkan. Pada 23 November 1992, setiausaha hakim telah menulis surat kepada peguamcara perayu bahawa beliau masih sedang menaip nota keterangan itu. Pada 28 November 1992, peguamcara perayu membuat permohonan rasmi kepada penolong kanan pendaftar untuk perlanjutan masa bagi memfailkan rekod rayuan atas alasan bahawa mereka sedang menunggu nota keterangan. Pada 18 Disember 1992, timbalan pendaftar Mahkamah Agung telah memaklumkan kepada peguamcara perayu bahawa permohonan mereka untuk perlanjutan masa telah ditolak atas dasar bahawa permohonan mereka untuk nota keterangan itu adalah lewat. Perayu telah membuat permohonan untuk perlanjutan masa kepada Mahkamah Agung pada 21 Disember 1992.

Diputuskan, menolak permohonan perayu itu:

(1) Timbalan pendaftar itu hanya menjalankan suatu tugas pentadbiran mengikut Arahan Amalan No 5 Tahun 1990 apabila beliau menolak permohonan untuk perlanjutan masa itu. Arahan amalan bertujuan untuk memberi arahan bagi tujuan pentadbiran dan kuasa untuk membenarkan suatu perlanjutan masa terletak dengan Mahkamah Agung di bawah k 62(7) KMA, yang

memperuntukkan bahawa memorandum dan rekod rayuan mesti difailkan dalam tempoh enam minggu selepas pemfailan rayuan atau dalam apa-apa tempoh selanjutnya yang mungkin dibenarkan oleh Mahkamah Agung atau seorang hakim mahkamah itu.

(2) Di dalam kes ini, perayu telah memohon untuk perlanjutan masa hanya pada 21 Disember 1992, iaitu selepas lebih dari lapan minggu selepas notis rayuan difailkan, walaupun ia telahpun diberitahu pada 21 November 1992 oleh setiausaha hakim perbicaraan bahawa beliau masih menaip nota keterangan itu. Walaupun di bawah k 62(7), mahkamah mempunyai budi bicara untuk membenarkan suatu perlanjutan masa untuk memfailkan rekod rayuan, tidak terdapat apa-apa asas di mana mahkamah boleh menjalankan budi bicaranya. Sesungguhnya, kelengahan itu diakui telah disebabkan oleh kelalaian dan kesilapan peguamcara perayu.]

Notes

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Hume v Somerton (1890) 25 QBD 239 (refd)
Jayasankaran v PP [1983] 1 MLJ 379 (refd)
Langton v Lloyds Bank [1960] 1 All ER 657 (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)
Warinco v Samor SpA [1979] 1 Lloyd's Rep 450 (distd)

Legislation referred to

Rules of the High Court 1980
Rules of the Supreme Court 1980 rr 2, 62(7)
Administration of Justice (Appeals) Act 1934 [GB]
Judicature (Northern Ireland) Act 1978 [NI]
Administration of Justice Act 1969 [UK]
Appellate Jurisdiction Act 1876 [UK]
Appellate Jurisdiction Act 1887 [UK]
Supreme Court Act 1981 s 84 [UK]

Appeal from: Civil Suit No 449 of 1981 (High Court, Pulau Pinang)

Lim Kean Siew and *Dr Jagjit Singh Sidhu* (*Lim Kean Siew & Co*) for the appellants in Civil Appeal No 02–489–92.

CV Das (*Presgrave & Matthews*) for the respondents in Civil Appeal No 02–489–92.

Cecil Abraham and *JA Yeoh* (*Shearn Delamore & Co*) for the appellants in Civil Appeal No 02–488–92.

Cur Adv Vult

Zakaria Yatim JCA (delivering the judgment of the court): There were three notices of motion which the court had to decide before hearing the appeals in Civil Appeal Nos 02–488–1992 and 02–489–1992. A

In the first notice of motion, the appellant in appeal No 02–488 of 1992 sought the leave of the court to file a supplementary record of appeal to include several documents which were not included in the original record of appeal. The respondents did not object to the application and the court accordingly made an order in terms of the application. B

In the second notice of motion, the appellant in appeal No 02–489 of 1992 applied for an extension of time to file the record of appeal after the expiry of the six weeks pursuant to r 62(7) of the Rules of the Supreme Court 1980 ('the RSC'). In the third notice of motion, the respondents in appeal No 02–489 of 1992 applied for an order that the notice of appeal filed by the first appellant on 24 October 1992 be struck out with costs. The second and third notices of motion were interrelated and we decided to hear them together. C

The affidavit in support of the appellant's application for extension of time was affirmed by Dr Jagjit Singh Sidhu on behalf of the appellant. In that affidavit, the deponent averred that the learned trial judge, Edgar Joseph Jr J (as he then was), entered judgment in Pulau Pinang Civil Suit No 449 of 1981 against the appellant on 12 October 1992. The appellant filed a notice of appeal against the decision of the learned judge on 24 October 1992 which was well within the time specified under the RSC. The deponent said that the time limited for requesting the notes of evidence was one week from the date of the filing of the notice of appeal. The deponent, however, admitted that the request was not made until 18 November 1992. The deponent said that the 'reasons why we were late for requesting the notes of evidence was due to inadvertence and under the mistaken impression that the said request was to be made within one week of the expiry of the one month from the filing of the notice of appeal'. On 27 November 1992, the appellant's solicitors received a letter from the secretary to the learned judge informing them that the notes of evidence were in the process of being prepared and would be sent to them when they were completed. The deponent further averred that on 28 November 1992, the appellant's solicitors formally applied to the senior assistant registrar for an extension of time to file the appellant's record of appeal on the grounds that they were awaiting the notes of evidence. On 18 December 1992, the appellant's solicitors received a letter from the deputy registrar of the Supreme Court dated 9 December 1992 informing them that their application for extension of time had been refused on the grounds that their request for the notes of evidence had been delayed. D E F G H

Mr Ooi Kim Keat, in his affidavit in support of the third notice of motion averred that the deputy registrar had rejected the application of the appellant's solicitors for extension of time to file the appeal record because the appellant had failed to comply with Practice Direction 2 of 1991 based on the ground that the letter to the secretary to the learned judge requesting for the notes of evidence had been made more than one week from the filing of the notice of appeal. The deponent stated that the application for I

A the notes of evidence was only made by the appellant's solicitors more than 25 days after the notice of appeal was filed and was not in accordance with the said practice direction. The deponent further said that the appellant had no good ground to explain the delay to request for the notes of evidence from the secretary to the learned judge.

B The respondents referred to the deputy registrar's letter dated 9 December 1992 and contended that the appellant's application for extension of time to file the appeal record did not comply with Practice Direction 2 of 1991. The letter reads as follows:

> C T/n Lim Kean Siew & Co
> Peguambela dan peguamcara
> Tkt 5, Wisma Penang Garden
> No 42, Jalan Sultan Ahmad Shah
> 10050 Pulau Pinang
>
> Tuan
>
> D Mahkamah Agung Rayuan Sivil No 02–489–92
> (Mahkamah Tinggi Pulau Pinang Guaman Sivil No 449/81)
>
> Tan Ah Chim & Sons Sdn Bhd ... Perayu
>
> dan
>
> E Ooi Bee Tat dan Satu Lagi ... Penentang
>
> Surat tuan bertarikh 28 November 1992 adalah dirujuk.
>
> Adalah dimaklumkan bahawa permohonan tuan untuk mendapatkan perlanjutan masa memfailkan rekod rayuan adalah ditolak kerana tidak mematuhi Nota Amalan 2/91.
>
> F (a) Surat memohon nota keterangan daripada setiausaha dibuat lewat iaitu lebih dari satu minggu dari tarikh notis rayuan difailkan.
>
> Oleh itu jika tuan masih berminat untuk meneruskan rayuan ini tuan dikehendaki memfailkan secara notis usul.
>
> Sekian dimaklumkan.
>
> G 'Berkhidmat untuk negara'
>
> Saya yang menurut perintah
> —tt—
> Timbalan Pendaftar
> Mahkamah Agung
> Kuala Lumpur

H It is not in dispute that the notice of appeal was filed by the appellant on 24 October 1992. The respondents said that on 18 November 1992, the appellant's solicitors wrote to the secretary of the learned trial judge for the notes of evidence. The respondents, therefore, contended that the appellant had applied for the notes of evidence more than one week after the filing I of the notice of appeal. Practice Direction 5 of 1990 states as follows:

> (1) Dalam tempoh satu minggu dari tarikh notis rayuan difailkan, perayu hendaklah memohon kepada setiausaha hakim perbicaraan untuk dibekalkan satu salinan terperaku nota keterangan, melalui surat seperti berikut.

Mr Lim Kean Siew submitted that practice notes had no statutory authority. He referred to para 701 of 2 *Supreme Court Practice 1993* at p 161, where the learned authors state that Practice Masters Rules or Directions have no statutory authority and cannot be treated as the discretion of the court under s 84 of the Supreme Court Act 1981. The learned authors cited *Hume v Somerton* (1890) 25 QBD 239 at p 243; and *Langton v Lloyds Bank* [1960] 1 All ER 657 in support of the proposition. We agree with what is stated in the *White Book*.

Mr Cyrus Das, counsel for the respondents, cited *Warinco v Samor SpA* [1979] 1 Lloyd's Rep 450. In that case, Lord Edmund-Davies in his speech on behalf of the Appeal Committee of the House of Lords said:

> But I think it is right to point out that it is as a matter of indulgence that we have allowed the merits to be gone into at all, because this is a petition which is 6½ months out of time. A wholly inadequate attempt has been made to explain the delay. The excuses offered, even when taken at their face value, explain some 3½ months only of the delay which has occurred, leaving a substantial period of time wholly unexplained.
>
> Laxity in relation to compliance with standing orders is increasing and it must be curbed. Earlier this year, in February, in another case quite unrelated to the present one, the noble and learned Viscount Dilhorne said in words that we respectfully adopt:
>
> > 'The standing orders of this House are meant to be complied with. There are very experienced firms of solicitors acting on both sides, and there is a great deal of money involved. The standing orders of this House really cannot be treated as if they meant nothing, so that the parties can ignore them. The fact that there is no excuse for it is a matter we shall have to consider ...'
>
> We have considered the non-compliance in this case very carefully, and we want it to become known that laxity of this kind will not be tolerated.

We are of the view that the standing orders referred to in the above judgment are not the same as practice notes or practice directions. According to 2 *Supreme Court Practice 1993* at p 1513, the standing orders relating to the judicial proceedings in the House of Lords are made pursuant to the relevant Acts, and are agreed to, on motion, by the House itself. The relevant Acts are the Appellate Jurisdiction Acts 1876 and 1887; the Administration of Justice (Appeals) Act 1934; the Administration of Justice Act 1969; and the Judicature (Northern Ireland) Act 1978. The standing orders are therefore similar to what we generally call subsidiary legislation in this country and have the same status as the RSC or the Rules of the High Court 1980.

In the present case, when the deputy registrar refused the extension of time she was merely carrying out an administrative duty pursuant to the practice direction. Practice directions are intended to be no more than a direction for administrative purpose. (See *Jayasankaran v PP* [1983] 1 MLJ 379 at p 380.) Under r 62(7), the authority empowered to grant an extension of time is the court. Rule 2 of the RSC defines 'Court' to mean the Supreme Court or a judge of that court. Therefore, any application for

A extension of time to file the record of appeal must be made to the Supreme Court or to the judge of that court. Rule 62(7) provides that the memorandum and record of appeal shall be filed at the place where the appeal was entered within six weeks after the entry of the appeal or within such further time as the court may allow.

B The present application for extension of time was filed on 21 December 1992, that is more than eight weeks after the date of the filing of the notice of appeal. On 23 November 1992, the secretary to the learned judge wrote to the appellant's solicitors that he was still typing the notes of evidence. The appellant knew that there was a lengthy trial and that the secretary would take some time to type the notes of evidence. Yet C the appellant did not deem it fit to apply to this court for extension of time. The appellant waited until after the expiry of the six-week period to make the present application.

Under r 62(7), the court has the discretion to grant an extension of time to file the record of appeal. The appellant may even file the application D after the expiry of the six-week period provided it has good reasons for doing so. In the present case, the appellant knew that it would take some time for the notes of proceedings to be typed. It was not diligent enough to file the application upon receiving the letter from the secretary to the learned judge dated 23 November 1992.

E In *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, the Privy Council (on an appeal from the Court of Appeal of the Federation of Malaya) said in its judgment at p 229, that the 'rules of court must prima facie be obeyed, and in order to justify a court in extending the time there must be some material upon which the court can exercise its discretion'.

In the present case, the materials before us did not justify us to F exercise our discretion to grant the extension. Indeed, Dr Sidhu admitted in his affidavit that the delay was due to the inadvertence and mistake of the appellant's solicitors. For the reasons stated above, we dismissed the appellant's application with costs.

G *Application dismissed.*

Reported by Prof Ahmad Ibrahim

H

I